

CYNTHIA H. COFFMAN
Attorney General

MELANIE J. SNYDER
Chief Deputy Attorney General

LEORA JOSEPH
Chief of Staff

FREDERICK R. YARGER
Solicitor General



**STATE OF COLORADO
DEPARTMENT OF LAW**

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 7th Floor
Denver, Colorado 80203
Phone (720) 508-6000

**Natural Resources and
Environment Section**

January 9, 2018

Letter by Electronic Mail

Alan J. Gilbert
Steven Perfremment
Daniel Levey
Bryan Cave LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203

Re: Resolving Issues Raised in the Plaintiffs' Motions to Compel

Dear Alan, Steven, and Daniel:

The Plaintiffs are writing to you today in an attempt to resolve the issues raised in the Plaintiffs' December 11, 2017 and December 22, 2017 Motions to Compel prior to the scheduled January 19, 2018 conference with Judge Matsch. In order to facilitate such a resolution, the Plaintiffs have identified three outstanding issues that, if resolved, could lead to resolution of all issues raised in the two motions.

Since the two motions to compel have been filed, the City has produced an additional 28 documents previously withheld on the privilege log; provided Mr. Helme's field notes related to Star Ranch Filing No. 2; and identified the bates numbers for Mr. Mackey's field notes related to the Morningstar EDB. These are important steps to resolving the outstanding issues related to the motions to compel. However, outstanding issues remain. At this time, the Plaintiffs have identified nine documents that the City told the Court and the parties were produced, but apparently have not been produced. The Plaintiffs request their immediate production, or an explanation of why they continue to be withheld despite representations that they have been produced. Additionally, some privilege log entries still lack basic information required by the federal rules, such as identification of an attorney for claimed attorney-client communications. The Plaintiffs request this information for five entries previously identified to the City. And, in order to remedy the prejudice created by the City's repeated failure to produce Mr. Helme's field notes until two weeks after his deposition the Plaintiffs request that the City consent to re-opening

Mr. Helme's deposition for an additional two hours. If the City does not voluntarily agree to do so, the Plaintiffs hereby confer with the City regarding their intent to request permission from the Court to re-open Mr. Helme's deposition for an additional two hours.¹

1. Missing Documents

In the City's December 26, 2017 letter from Dan Levey to Leslie Coleman and in its December 29, 2017 response to the Plaintiffs' December 11, 2017 motion to compel, the City told the parties and the Court that the City was producing the following nine documents as part of the City's Sixth Production:

- City's Privilege Log Entry 277
- City's Privilege Log Entry 380
- City's Privilege Log Entry 381
- City's Privilege Log Entry 442
- City's Privilege Log Entry 1418
- City's Privilege Log Entry 1421
- City's Privilege Log Entry 1423
- City's Privilege Log Entry 1424
- City's Privilege Log Entry 1530

However, after a detailed review, documented in the chart in Attachment 1, the Plaintiffs have not been able to locate any of these nine documents in the City's Sixth Production. The Plaintiffs request their immediate production, or an explanation of why they continue to be withheld despite representations to the Court and to the Plaintiffs that they have been produced.

¹ On December 19, 2017, the State requested documents from Jeffrey Mark, President of the Landhuis Company, 212 N. Wahsatch Ave., Suite 301, Colorado Springs, CO 80903, relating to Star Ranch Filing 2. The State requested these documents from Mr. Mark in response to the City's December 14, 2017 supplementation to its initial disclosures. On December 14, 2017, the City supplemented its list of witnesses likely to have discoverable information that it may use to support its defenses and claims to include Mr. Jeffrey Mark. The City further stated in its supplemental disclosures that Mr. Mark may have information related to the claims and defenses in this action. The State is in the process of preparing to produce all documents, including maps, field inspections and emails related to Star Ranch, that it received from Mr. Mark so that all Parties may have access to them. Given the City's failure to produce the vast majority of documents during fact discovery and its belated notice to the Plaintiffs that the City intends to relay upon such documents, the Plaintiffs reserve the right to seek permission from the Court to ask Mr. Helme about this information as well, assuming the Court agrees that Mr. Helme's deposition should be re-opened for an additional two hours as proposed as a result of the failure of the City to turn over Mr. Helme's field notes in a timely fashion.

2. Needed Information for Five Privilege Log Entries

Five privilege log entries previously identified to the City still lack basic information so as to enable other parties to assess the claim of privilege. *See* Fed. R. Civ. P. 26(b)(5)(A)(ii); Discovery Order ¶¶ 32-35, Doc. No. 35; *See also S.E.C. v. Nacchio*, No. CIV.A. 05-CV-00480MS, 2007 WL 219966, at *5 (D. Colo. Jan. 25, 2007) (“the party withholding information on the basis of privilege must make a clear showing that the asserted privilege applies and must establish all elements of the privilege. *National Union Fire Ins. Co. of Pittsburgh v. Midland Bancor, Inc.*, 159 F.R.D. 562, 567 (D.Kan.1994). *Cf. McCoo v. Denny's Inc.*, 192 F.R.D. 675, 683 (D Kan.2000) (the party invoking the work product doctrine must establish all elements of the doctrine through an evidentiary showing based on competent evidence; “the burden ‘cannot be discharged by mere conclusory or ipse dixit assertions’ ”); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir.1995) (“a mere allegation that the work product doctrine applies is insufficient”). The Plaintiffs request that the City either produce these documents, supplement the corresponding privilege log entries, as described below in the “Issues Identified by Plaintiffs” column, or bring the documents to the January 19th conference with Judge Matsch for an in-camera review.

For those documents that the City claims are deliberative process, the Discovery Order requires a supporting declaration within 45 days after service of the privilege log. Discovery Order ¶¶ 35, Doc. No. 35. If the City continues to maintain the documents are deliberative process, the Plaintiffs request that the supporting declaration be provided so that the Court may assess the validity of the deliberative process claim at the January 19th conference.

Privilege Entry	Date Sent/ Last Modified	Email From/ Author	Email To	Email CC/ BCC	City's Revised Privilege Description	City's Revised Basis for Withholding	Issues Identified by Plaintiffs
293	11/19/2004 9:00:22 AM	Lisa Ross	Terri Flack; Alan Williamson; Don Parkison; Jeff Besse; Joel Mackey; Julie Pearson; Ken Sampley; Todd Sturtevant; Frank Helme; James Quick	Gary Haynes	The portion of the document containing confidential attorney client communication has been redacted.	Attorney-Client Privilege	Produced, but redaction has not been explained (no attorney identified; no showing that redacted communication was made for the purpose of obtaining or providing legal advice)

Privilege Entry	Date Sent/ Last Modified	Email From/ Author	Email To	Email CC/ BCC	City's Revised Privilege Description	City's Revised Basis for Withholding	Issues Identified by Plaintiffs
909	1/18/2008 8:53:33 AM	Cheryl Callahan	Tiffany Haywood	Lisa Ross	Email related to deliberative process of a City ordinance prepared for and under the direction of attorney representing the City in anticipation or furtherance of litigation.	Work Product; Attorney Client; Deliberative Process	No attorney identified; no showing that litigation was reasonably anticipated; declaration required by Discovery Order for deliberative process privilege claim
1353	1/18/2008 8:53:33 AM	Cheryl Callahan	Tiffany Haywood	Lisa Ross	Email communication among City employees and to City attorney related to drafting of a City ordinance.	Work Product; Deliberative Process	No attorney identified; no showing that litigation was reasonably anticipated; declaration required by Discovery Order for deliberative process privilege claim
1355	5/4/2004 9:40:19 AM	Robert Mack	Lisa Ross		Email communication between City employees forwarding confidential City attorney-client communication regarding stormwater program.	Attorney Client; Work Product	No attorney identified. Protected communications should be redacted from document; document should not be withheld in its entirety.
1357	5/4/2004 9:23:28 AM	Lisa Ross	Julie Pearson		Email communication between City employees forwarding confidential City attorney-client communication regarding stormwater program.	Attorney Client; Work Product	No attorney identified. Protected communications should be redacted from document; document should not be withheld in its entirety.

3. Failure by City to Timely Produce Mr. Helme's Field Notes Has Prejudiced the Plaintiffs

The City produced Frank Helme's 38 pages of hand-written field notes two weeks after Mr. Helme's December 12, 2017 deposition. The City's failure to timely produce these documents prejudiced Plaintiffs in numerous ways. As practically the only City inspector to inspect Star Ranch Filing 2 during construction, Mr. Helme and his field notes are of central importance in litigation of the Star Ranch exemplar site, particularly Claims 9 and 10 (which address the adequacy of the City's construction inspections and subsequent enforcement actions). Plaintiffs did not have the opportunity to ask Mr. Helme a number of important questions at his deposition relating to, among other things, his field notes and inspection practices.

The Plaintiffs disagree with the City's apparent assertion that the Plaintiffs already had access to the same information in the final inspection reports as provided in Frank Helme's handwritten notes. First, the City makes this statement without providing factual support. Second, Mr. Helme's handwritten field notes related to Star Ranch were separate, responsive documents that should have been produced in addition to any electronic inspection reports. Fed.R.Civ.P. 34(a)(1). Third, Mr. Helme's handwritten notes are different than and substantially less detailed than the final inspection reports, an important distinction that Plaintiffs had the right to question Mr. Helme about during his deposition on December 12, 2017. Fourth, while Mr. Helme wrote 59 final inspection reports, he has, to date, only produced 38 hand-written inspection note documents. Plaintiffs accordingly do not know if these 38 pages of field notes are all of Mr. Helme's Star Ranch field notes or only a portion of such notes.

Other issues include references in Helme's hand-written notes to pictures of at least one site, yet those pictures have not been produced to Plaintiffs; inspections which were completed, but for which no final inspection report has issued; and Star Ranch inspections that were completed after the date on which a final report issued. Plaintiffs are entitled to examine Mr. Helme on these issues and others.

By failing to provide Mr. Helme's notes before the close of fact discovery, the City deprived the Plaintiffs of the opportunity to ask Mr. Helme about these issues.

The Plaintiffs do not believe lengthy discovery disputes are of benefit to any of the parties. Accordingly, Plaintiffs request that the City: (1) agree to re-open Mr. Helme's deposition for an additional two hours; (2) immediately produce the documents described in Section 1 above or provide an explanation of why the documents continue to be withheld; and (3) either produce the documents described in Section 2 above or provide a declaration supporting the claims made by the City. Please let the Plaintiffs know if the City is amenable to resolving Plaintiffs' two motions to compel by reaching agreement on these three outstanding issues.

Sincerely,

FOR THE ATTORNEY GENERAL

Meg Parish
First Assistant Attorney General
Water Quality and Radiation Unit
Natural Resources & Environment Section
Colorado Department of Law
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203
Phone: (720) 508-6265
meg.parish@coag.gov

FOR PLAINTIFF THE UNITED STATES OF
AMERICA:

s/ Heidi Hoffman
HEIDI HOFFMAN
LESLIE COLEMAN
DEVON A. AHEARN
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, Colorado 80202
Tel: (303) 844-1392 (Heidi)
Tel: (202) 514-2717 (Devon)
Tel: (202) 514-1032
Email: Leslie.Coleman@usdoj.gov
Email: Heidi.Hoffman@usdoj.gov
Email: Devon.Ahearn@usdoj.gov

FOR INTERVENOR PLAINTIFF LOWER
ARKANSAS WATER CONSERVANCY DISTRICT:

s/ Patrick M. Haines
PATRICK M. HAINES
Berg Hill Greenleaf Ruscitti LLP
1712 Pearl Street

Boulder, Colorado 80302
Tel: (303) 402-1600
Email: pmh@bhgrlaw.com

FOR INTERVENOR PLAINTIFF BOARD OF
COUNTY COMMISSIONERS OF THE COUNTY
OF PUEBLO:

s/ Thomas W. Korver
THOMAS W. KORVER
Petros & White LLC
1999 Broadway, Suite 3200
Denver, Colorado 80202
Tel: (303) 825-1980
Email: tkorver@petros-white.com

All Documents Produced By the City on 12/26/2017 Cross-Referenced With the Documents Marked as Produced in Sixth Production in 12/26/2017 Privilege Log

Plaintiffs' Assumption of Privilege Log #	Bates Beg	Custodian	File Name	Sent Date	Subject	Date in privilege Log (for missing docs)	Email From/Author in Privilege Log (for missing Docs)
7	CITY_5G_0376695	Steve Kuehster	re: epa ms4 permit audit (week of feb 3).msg	2/5/2013	RE: EPA MS4 permit audit (week of Feb 3)		
370	CITY_5G_0376706	Stormwater Server Folder	chapter 13 storage dwb 011313.docx				
372	CITY_5G_0376765	Stormwater Server Folder	maximized_wqcv_1994_report.pdf				
586	CITY_5G_0376926	Dave Lethbridge	star ranch annexation agreement.msg	4/2/2004	Star Ranch Annexation agreement		
Appears to be 589, not marked as produced	CITY_5G_0376927	Dave Lethbridge	re: star ranch annexation agreement.msg	4/7/2004	RE: Star Ranch Annexation agreement		
1351	CITY_5G_0376944	Cam McNair	fw: stormwater management assessment - staff working group meeting, tuesday, jan 15, 2008, cab eng, large 403.msg	1/4/2008	FW: Stormwater Management Assessment - Staff Working Group Meeting, Tuesday, Jan 15, 2008, CAB Eng, Large 403		
1365	CITY_5G_0376700	Steve Kuehster	fw: underdrain ordinance and exhibits. .msg	8/26/2010	FW: Underdrain Ordinance and Exhibits.		
1366	CITY_5G_0376701	Steve Kuehster	fw: draft, draft, draft, underdrain staff memo. .msg	8/20/2010	FW: Draft, Draft, Draft, Underdrain Staff Memo.		
200 - not marked as produced	CITY_5G_0376702	Jeff Besse	re: ms4 program improvement workshop follow-up.msg	10/31/2015	RE: MS4 Program Improvement Workshop follow-up		
584	CITY_5G_0376923	Dave Lethbridge	re: star ranch annexation agreement.msg	4/7/2004	RE: Star Ranch Annexation agreement		
371	CITY_5G_0376744	Stormwater Server Folder	m-barehydrology + bmplid direction draft package.pdf				
397, 398, 399, 400, 926, 927, 928, 929	CITY_5G_0376781	Joel Mackey	re: morningview bmp maintenance agreement.msg	12/12/2013	Re: Morningview BMP maintenance agreement		

All Documents Produced By the City on 12/26/2017 Cross-Referenced With the Documents Marked as Produced in Sixth Production in 12/26/2017 Privilege Log

397, 398, 399, 400, 926, 927, 928, 929	CITY_5G_0376784	Joel Mackey	re: morningview bmp maintenance agreement.msg	12/9/2013	RE: Morningview BMP maintenance agreement		
397, 398, 399, 400, 926, 927, 928, 929	CITY_5G_0376786	Joel Mackey	re: morningview bmp maintenance agreement.msg	12/9/2013	RE: Morningview BMP maintenance agreement		
397, 398, 399, 400, 926, 927, 928, 929	CITY_5G_0376788	Joel Mackey	re: morningview bmp maintenance agreement.msg	12/9/2013	RE: Morningview BMP maintenance agreement		
397, 398, 399, 400, 926, 927, 928, 929	CITY_5G_0376933	Steve Gardner	re: morningview bmp maintenance agreement.msg	12/12/2013	Re: Morningview BMP maintenance agreement		
397, 398, 399, 400, 926, 927, 928, 929	CITY_5G_0376936	Steve Gardner	re: morningview bmp maintenance agreement.msg	12/9/2013	RE: Morningview BMP maintenance agreement		
397, 398, 399, 400, 926, 927, 928, 929	CITY_5G_0376938	Steve Gardner	re: morningview bmp maintenance agreement.msg	12/9/2013	RE: Morningview BMP maintenance agreement		
397, 398, 399, 400, 926, 927, 928, 929	CITY_5G_0376940	Steve Gardner	re: morningview bmp maintenance agreement.msg	12/9/2013	RE: Morningview BMP maintenance agreement		
Unclear	CITY_5G_0376791	Travis Easton	epa-doj jan14 meeting slides workingdraft v3.pptx				
293	CITY_5G_0376704	Jeff Besse	re: epa audit report status.msg	11/19/2004	RE: EPA audit report status		
1376	CITY_5G_0376705	Tim Mitros	fw: draft, draft, draft, underdrain staff memo. .msg	8/20/2010	FW: Draft, Draft, Draft, Underdrain Staff Memo.		
401	CITY_5G_0376790	Shirley Applegate	fw: stormwater management assessment - staff working group meeting, tuesday, jan 15, 2008, cab eng, large 403.msg	1/9/2008	FW: Stormwater Management Assessment - Staff Working Group Meeting, Tuesday, Jan 15, 2008, CAB Eng, Large 403		
585	CITY_5G_0376925	Dave Lethbridge	re: star ranch annexation agreement.msg	4/6/2004	RE: Star Ranch Annexation agreement		

All Documents Produced By the City on 12/26/2017 Cross-Referenced With the Documents Marked as Produced in Sixth Production in 12/26/2017 Privilege Log

1383	CITY_5G_0376929	Dave Lethbridge	re: star ranch annexation agreement.msg	4/7/2004	RE: Star Ranch Annexation agreement		
590	CITY_5G_0376931	Dave Lethbridge	re: star ranch annexation agreement.msg	4/7/2004	RE: Star Ranch Annexation agreement		
1348	CITY_5G_0376942	Lisa A. Ross	fw: stormwater discharge ordinance.msg	4/27/2006	FW: Stormwater Discharge Ordinance		
1349	CITY_5G_0376943	Lisa A. Ross	fw: stormwater.msg	5/10/2006	FW: Stormwater		
277	Missing		No email to recipient listed in privilege log (Nathan Moore)			9/1/2015 14:06	FROM: Besse, Jeff TO: Moore, Nathan
380	Missing		No documents including author's name (Kathy Dolan) or dated in 2011			6/17/2011	kdolan
381	Missing		No documents including author's name (Kathy Dolan) or dated in 2011			6/17/2011	Kathy Dolan
442	Missing		No documents including author's name (nvetter) or dated in 2016			1/11/2016	nvetter
1418	Missing		no non-emails including the author's name or dated 9/22/2015			9/22/2015 14:57	[Stand alone document from Lisa Ross]
1421	Missing		no non-emails including the author's name or dated 9/22/2015			9/22/2015 14:57	Document attached to email]
1423	Missing		no non-emails including the author's name or dated 9/22/2015			9/22/2015 14:57	Document attached to email]
1424	Missing		no non-emails including the author's name or dated 9/22/2015			9/22/2015 14:57	[Document from Lisa Ross attached to email]
1530	Missing		No email with these senders/recipients dated in 2015			12/1/2015 19:25	FROM: Kuehster, Steve TO: Besse, Jeff